

STATE OF MICHIGAN
COURT OF APPEALS

FIRST AMERICAN TITLE INSURANCE
COMPANY,

UNPUBLISHED
April 26, 2011

Plaintiff-Appellant,

v

No. 295990
Kent Circuit Court
LC No. 07-007242-CZ

CITIMORTGAGE, INC., a/k/a CITIFINANCIAL
MORTGAGE COMPANY, INC., f/k/a
ASSOCIATES HOME EQUITY SERVICES,
INC.,

Defendant-Appellee,

and

MIKE MOONEY,

Defendant.

Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's judgment finding defendant's¹ mortgage void only as to \$3,500 and valid as to any amount in excess of that. We affirm, albeit for different reasons than the trial court.

I. BASIC FACTS AND PROCEDURE

The underlying facts of this case are not in dispute. In 1997, Charles Gahan conveyed the property at issue to Lisa Overway by a warranty deed. In 1999 Overway married Gahan, changed her name, and deeded the property by quitclaim to herself in her new name. On March

¹ Because defendant Mike Mooney is not present in this appeal, all references to defendant shall mean only Citimortgage, Inc.

20, 2000, Lisa Gahan gave defendant a mortgage on the property in the amount of \$330,562.16. In 2003, Charles and Lisa Gahan together sold the property to Mike Mooney by a land contract, which granted Mooney possession of the premises. The land contract indicates that the Gahans' address at that time was no longer that of the property. The record contains no facts showing when they moved from the property. In 2005, both Gahans gave a mortgage on the property to Macatawa Bank and at the same time transferred to Macatawa Bank their interest in the land contract with Mooney. In 2007, Macatawa Bank assigned its mortgage to plaintiff. All of the above conveyances were duly recorded.

Also in 2007, the Gahans defaulted on the mortgage that Lisa Gahan gave to defendant in 2000. Notice was published starting on January 24, 2007, the property was posted on February 7, 2007, and the foreclosure sale took place on May 16, 2007, with defendant taking title to the property by way of the sheriff's deed. Plaintiff filed a complaint seeking declaratory relief and asking the trial court to declare defendant's mortgage, and the sheriff's deed that resulted from it, invalid. Plaintiff's theory was that because Charles Gahan had not signed defendant's mortgage agreement, the mortgage was invalid on his homestead under MCL 600.6023.

Defendant moved for summary disposition, arguing that the mortgage was valid because the house was not the Gahans' homestead at the time of foreclosure because they had conveyed it by land contract to Mooney. Plaintiff's response argued that under the statute, the mortgage was invalid from the outset because Charles Gahan had not signed it. Defendant's response countered that if the trial court were to find the mortgage invalid, then it should find the mortgage invalid only as to \$3,500, the statutory maximum value of a homestead.

The court denied defendant's motion based on MCR 2.116(C)(10), because it found questions of fact existed concerning whether the house was Charles Gahan's homestead at the time Lisa Gahan gave the mortgage. However, the court granted the motion under MCR 2.116(C)(8), "provided that is the mortgage at issue is found to be invalid, it is only void as to the homestead amount of \$3,500, but it is valid for any excess over and above the homestead." The court explained that it was making a legal ruling on the construction of the statute. The court did not specifically find the mortgage invalid, however. Rather, the court determined that, "to the extent that[,] if it is determined to be invalid, that [sic] the limit of the damage would be 3,500, so I'm not finding it invalid as a matter of law at this point."

The court held a bench trial on June 22, 2009. The court found that Charles Gahan had resided at the home during January through May 2000, the time defendant's mortgage was given. The court also "readopt[ed] by reference all of its findings and legal conclusions" in its 2008 order. The court did not address whether the house was the homestead of the Gahans at the time of the foreclosure, nor was the issue raised at trial. Final judgment was entered on December 23, 2009, again ruling that \$3,500 of the mortgage signed only by Lisa Gahan was void due to it not being signed by Charles Gahan, but for any amount in excess of that, the mortgage was valid.

II. STANDARD OF REVIEW

We review de novo both a trial court's decision on a motion for summary disposition, *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998), issues of statutory interpretation, *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 297; 791 NW2d 897 (2010),

and constitutional issues. *Harvey v Mich*, 469 Mich 1, 6; 664 NW2d 767 (2003). We review a trial court's findings of fact in a bench trial for clear error. MCR 2.613(C); *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005). "Findings of fact are deemed clearly erroneous where the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 329-330.

III. ANALYSIS

At issue in this case is the exemption of homestead property from levy and sale. Const 1963, art 10, § 3 provides:

A homestead in the amount of not less than \$3,500 and personal property of every resident of this state in the amount of not less than \$750, as defined by law, shall be exempt from forced sale on execution or other process of any court. Such exemptions shall not extend to any lien thereon excluded from exemption by law.

Similarly, MCL 600.6023 provides:

(1) The following property of the debtor and the debtor's dependents shall be exempt from levy and sale under any execution:

* * *

(h) A homestead of not exceeding 40 acres of land and the dwelling house and appurtenances on that homestead, and not included in any recorded plat, city, or village, or, instead, and at the option of the owner, a quantity of land not exceeding in amount 1 lot, being within a recorded town plat, city, or village, and the dwelling house and appurtenances on that land, owned and occupied by any resident of this state, not exceeding in value \$3,500.00. This exemption extends to any person owning and occupying any house on land not his or her own and which the person claims as a homestead. However, this exemption does not apply to any mortgage on the homestead, lawfully obtained, except that the mortgage is not valid without the signature of a married judgment debtor's spouse unless either of the following occurs:

(i) The mortgage is given to secure the payment of the purchase money or a portion of the purchase money.

(ii) The mortgage is recorded in the office of the register of deeds of the county in which the property is located, for a period of 25 years, and no notice of a claim of invalidity is filed in that office during the 25 years following the recording of the mortgage.

The parties in this case are arguing over the application of the language in MCL 600.6023(h) that "this exemption does not apply to any mortgage on the homestead, lawfully obtained, except that the mortgage is not valid without the signature of a married judgment debtor's spouse." The problem with the focus on this language is that it ignores the initial premise of the statute and the

constitutional provision that only homestead property that is owned and *occupied* is exempt. Const 1963, art 10, § 3; MCL 600.6023(h). Furthermore, “[w]hether real estate is exempt as a homestead from sale on execution must be determined as of the time of the levy rather than at the time of the sale.” *Cross v Fruehauf Trailer Co*, 354 Mich 455, 463; 93 NW2d 233 (1958).

There is no evidence that either of the Gahans still occupied the home when the foreclosure and sale occurred in 2007. Accordingly, the validity of the mortgage should have never come into question because the exemption in MCL 600.6023(h) did not apply. Although the trial court did not err when it found the home was Charles Gahan’s homestead in 2000, that conclusion fails to address that the property was subject to foreclosure because it was no longer the Gahan homestead *at the time of foreclosure*.

III. CONCLUSION

Because the property was not the Gahans’ homestead at the time of levy, i.e. foreclosure, the exception from levy and forced sale, whether found in the Michigan Constitution or MCL 600.6023, was inapplicable. *Cross*, 354 Mich at 463. Accordingly, there was no reason to consider the exemptions and exceptions found in MCL 600.6023(h) when determining the validity of defendant’s mortgage.

Although our conclusion would entitle defendant to the \$3,500 that the trial court excluded under the homestead exemption, because defendant failed to file a cross-appeal, it may not obtain a more favorable decision than it received in the lower court. *ABATE v PSC*, 192 Mich App 19, 24; 480 NW2d 585 (1991).

Affirmed.

/s/ Douglas B. Shapiro
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello